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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. RUSSELL JORGE PLIEGO, Defendant and Appellant.	A103258 (Solano County Super. Ct. No. VCR161670)

Defendant Russell Jorge Pliego appeals from a judgment of conviction upon a jury verdict finding him guilty of four counts of forcible oral copulation (Pen. Code,[1] § 288a, subd. (c)(2)), one count of assault with intent to commit rape (§ 220), and one count of sexual penetration with a foreign object by means of force and violence (§ 289, subd. (a)(1)). He contends the trial court improperly denied his motion for a new trial based on new evidence. He also contends the trial court should have instructed the jury sua sponte pursuant to CALJIC No. 10.65 (6th ed. 1996) (CALJIC No. 10.65), which provides that a reasonable and good faith belief in consent negates the criminal intent necessary for rape, forcible oral copulation, or penetration by a foreign object. We find no error, and affirm.

I. BACKGROUND

A. Prosecution Evidence

In March 2001, Kimberly B. was spending the weekend at an apartment in Benicia with her friend Tanya Villitora and Tanya's mother. She attended a party in Vallejo with

[1] All statutory references are to the Penal Code.

Tanya, Tanya's sister Joslyn,[2] and others, which lasted from late on the night of March 22 to early on March 23.[3] She told her friends several times that she wanted to leave; and finally, when it was close to 5:00 o'clock in the morning, she set out to walk from Vallejo to Benicia.

As Kimberly was walking, defendant, who was a stranger to her, stopped his car and asked if she needed a ride. She initially refused; but after he kept asking her, she agreed and got into defendant's car. As they drove, she told him she was a lesbian and she had a girlfriend. Defendant drove on the freeway and exited in Benicia, where he was stopped by a police officer because the car's taillights were not working. Defendant then drove toward Tanya's apartment building and pulled into the parking lot.

Kimberly thanked defendant for the ride and started to get out. Defendant looked at the gas gauge, then at Kimberly, then back at the gas gauge. Kimberly assumed he wanted gas money; she looked into her wallet and found only a $20 bill. She told him that was all she had, and he took the bill from her wallet. She was upset because she needed the money for transportation to a job interview.

Kimberly started putting her hand on the door to open it; defendant then took his seat belt off, put his arm around her neck, pulled her back into the car, and said she "was not leaving until [she] fucked him." He then put his hand on her neck, and forced her head down toward his penis. She tried to resist, but he forced her head down, and she orally copulated him for approximately 10 minutes. He kissed her on the mouth, then put her head back down on his lap and told her to continue performing oral sex. She did so. He then told her to take her clothes off, and she complied. Defendant then started kissing

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[2] Because Tanya and Joslyn Villitora have the same last name, we will refer to them by their first names. Similarly, we will refer to the victim, Kimberly B., by her first name. We mean no disrespect by this designation.

[3] There is some confusion in the record about whether the events at issue occurred on the night of March 22 to 23, or the night of March 23 to 24. Kimberly testified that they occurred on March 22 to 23. The information alleges the crimes took place on March 24, and declarations submitted in connection with the motion for new trial refer to the morning of March 24.

her mouth and breast and orally copulated her. He told her he wanted to have intercourse with her, and she said she did not want to do so without a condom. Defendant then grabbed her and pushed her head back down, and she again orally copulated him. He "tightened his grip on [her]" and "told [her] to suck." He then told her to lie back and he put his fingers inside her vagina. The contact hurt her, and she kept arching back and trying to scoot back in the seat.

Kimberly heard a car door slam, and defendant told her to get out of the car. She grabbed her clothes and got out. Defendant drove away. Kimberly threw on her shirt, ran to her friend's apartment, and banged on her friend's mother's window to wake her up. She did not discuss the incident with anyone at the time, but tried to fall asleep.

Later that morning, she spoke briefly with Tanya, but did not tell her about the incident because she was ashamed and embarrassed. She had to borrow money from Tanya because defendant had taken her $20. Later in the day, after telling Tanya about the incident, Kimberly reported it to the Benicia Police Department. A medical examination revealed fresh injuries, consisting of bruising, multiple abrasions, and an indentation on her genitals, which were consistent with blunt force trauma. The nurse with the Napa/Solano Sexual Assault Response Team who conducted the examination testified that these injuries were consistent with digital penetration of a woman who was not a willing partner in the sexual activity.

B. The Defense Case

Defendant testified that Kimberly initially refused his offer of a ride, but that after hesitating she agreed. During their conversation, she did not tell him she was lesbian. He left the freeway at the East Fifth Street exit before being pulled over by a police officer.

According to defendant, Kimberly never opened her wallet or gave him $20. As Kimberly started to leave the car outside the apartment complex, he asked her if she wanted to "mess around." She answered, "Now? This late?" Defendant said, "Sure. Why not?" Kimberly said, "Okay." They began to kiss, and they embraced each other. He touched her breasts, and she removed her jacket, shirt, t-shirt, and bra without being

asked to do so. He put his hand down her pants, and she unbuttoned her pants and pulled her pants and underpants partway down her legs without prompting; he then put his finger in her vagina, and she asked him to be gentle. He believed she consented to this touching. They were still kissing passionately, and she did not indicate any displeasure or discomfort. She did not squirm or scoot back. He never unzipped his pants, and she never touched his genital area. They were startled by hearing a car pulling out, and Kimberly began to put her clothes on. She offered him her phone number, and he refused it, saying he should not be doing this because he had a girlfriend. Kimberly told him she had a boyfriend and was pregnant. She got out of the car and went up the stairs to the building.

II. DISCUSSION

A. Motion for New Trial

After his conviction, defendant submitted a motion for new trial, contending new declarations of Tanya and Joslyn contradicted Kimberly's testimony. The motion included declarations by defendant's counsel, Tanya, and Joslyn. Defendant's counsel stated that before the trial, he had spoken with the mother of Tanya and Joslyn, who told him she did not have an address for either of her daughters. He found an address for Tanya, but discovered she was no longer at that address. Before trial, he tried unsuccessfully to locate Tanya and Joslyn by Social Security information, DMV records, and telephone directories.

Joslyn stated in her declaration that she saw Kimberly on the evening of March 24 after a policewoman brought her to the Benicia apartment. Kimberly told Joslyn that she performed oral sex on the person who had given her a ride after they got off the freeway at top of the hill at the Fifth Street off-ramp, and that "things continued" at the parking lot of the apartment complex. Kimberly did not tell Joslyn that the encounter had been against her will or that she had been forced to do anything.

Tanya stated in her declaration that on the morning after the incident, Kimberly did not borrow any money from her; in fact, she had her own money. Later that afternoon, Kimberly told Tanya that the person who gave her a ride home had tried to

"make out" with her in the apartment parking lot, and that he had put his finger in her. She made no mention of oral sex.

The trial court denied the motion, stating there was no reason the information could not have been produced prior to trial.

The standard of review after a trial court denies a motion for new trial is well established. " ' "The determination of a motion for a new trial rests so completely within the court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears." ' " (*People v. Delgado* (1993) 5 Cal.4th 312, 328 (*Delgado*).)

When a motion for new trial is based on newly discovered evidence, as here, "the trial court considers the following factors: ' "1. That the evidence, and not merely its materiality, be newly discovered; 2. That the evidence be not cumulative merely; 3. That it be such as to render a different result probable on a retrial of the cause; 4. That the party could not with reasonable diligence have discovered and produced it at the trial; and 5. That these facts be shown by the best evidence of which the case admits." ' " (*Delgado, supra*, 5 Cal.4th at p. 328; accord, *People v. Turner* (1994) 8 Cal.4th 137, 212.)

We see no manifest and unmistakable abuse of discretion in the trial court's determination that the testimony of Tanya and Joslyn could have been produced before trial. While defense counsel states that he tried to locate Tanya and Joslyn, he does not explain how he eventually found them and why he could not have taken the same steps to find them before trial that he took to find them after trial.

Defendant contends, however, that even if he was not diligent in seeking the evidence before trial, a new trial should be granted because the declarations call into question (1) whether defendant took Kimberly's money, and (2) whether any sexual contact took place before he and Kimberly arrived at the apartment parking lot. Defendant is correct that our Supreme Court concluded in *People v. Martinez* (1984) 36 Cal.3d 816, 825-826 (*Martinez*), that even where defense counsel has failed to use reasonable diligence in obtaining evidence before trial, a new trial should be granted

where the newly discovered evidence "would probably lead to a different result on retrial." However, as noted in *People v. Dyer* (1988) 45 Cal.3d 26, 52, the prosecution's case in *Martinez* was "*extremely* weak." The court in *Martinez* referred to the case as having a "fragile structure," and if accepted, the newly discovered evidence would "expose a serious gap in the prosecution's proof." (*Martinez, supra*, 36 Cal.3d at p. 822.)

That is not the case here. The prosecution's case rested on the direct testimony of the victim. While the declarations of Tanya and Joslyn call into question certain details of Kimberly's testimony, they do not call into question the basic theory of the prosecution's case. Whether Kimberly borrowed money from Tanya the next day is tangential at best, and does not relate to any element of the crimes. Similarly, Joslyn's recollection that Kimberly told her she had performed oral sex on defendant on Fifth Street before going to the parking lot, even if believed, does not disprove any element of the crimes.[4] In any case, the location of the sexual activity was not in dispute, since both Kimberly and defendant testified that all such activity took place in the parking lot. In our view, this is not a case in which the new evidence would probably have led to a different result at trial. The trial court did not abuse its discretion in denying defendant's motion for a new trial.

B. CALJIC No. 10.65

Defendant contends the court erred by failing, sua sponte, to give CALJIC No. 10.65, a standard instruction based upon *People v. Mayberry* (1975) 15 Cal.3d 143, 155 (*Mayberry*), which informs the jury that the criminal intent necessary for unlawful oral copulation or penetration by a foreign object does not exist "if the defendant had a reasonable and good faith belief that the other person voluntarily consented to engage in [the sexual activity]" (CALJIC No. 10.65). This instruction is "predicated on the notion that under section 26, reasonable mistake of fact regarding consent is incompatible with the existence of wrongful intent." (*People v. Williams* (1992) 4 Cal.4th 354, 360

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[4] The People suggest Joslyn may have confused Kimberly's account of the locations of the police stop and the sexual assault.

(*Williams*).) When a defendant adduces substantial evidence of "the victim's equivocal conduct on the basis of which he erroneously believed there was consent," and that his belief was "formed under circumstances society will tolerate as reasonable," the court must give a *Mayberry* instruction when it is requested (*Williams*, at p. 361); it must also do so sua sponte if it appears the defendant is relying on such a defense, or if there is substantial evidence to support the defense and it is not inconsistent with the defendant's theory of the case (*People v. Maury* (2003) 30 Cal.4th 342, 424). However, where the " 'defense evidence is unequivocal consent and the prosecution's evidence is of nonconsensual forcible sex, the [*Mayberry*] instruction should not be given.' " (*Williams*, *supra*, 4 Cal.4th at p. 362, quoting *People v. Burnett* (1992) 9 Cal.App.4th 685, 690; see also *People v. Rhoades* (1987) 193 Cal.App.3d 1362, 1368-1370.)

The record does not contain substantial evidence of equivocal conduct on Kimberly's part. Kimberly testified that defendant put his arm around her neck, pulled her back into the car, and told her she "was not leaving until [she] fucked him." He put his hand on her neck, and forced her head down toward his penis, although she tried to resist. She removed her clothes only on his orders, and tried to move away when he inserted his fingers into her vagina. This testimony does not indicate Kimberly acted in an equivocal manner that might have led defendant to believe she consented to the sexual contact.

Defendant's testimony is also devoid of evidence of equivocal conduct. He testified that Kimberly agreed to his suggestion that they "mess around," that she participated passionately in kissing him, that she removed her clothing unprompted when he touched her below her clothes, that she did not squirm away from him, and that she offered him her phone number. This is evidence that Kimberly unequivocally consented to the sexual activity, not that defendant mistakenly believed she had done so. Because these "wholly divergent accounts create no middle ground from which [defendant] could argue he reasonably misinterpreted [Kimberly's] conduct" (see *Williams*, *supra*, 4 Cal.4th at p. 362), there was no substantial evidence to support the *Mayberry* instruction.

III. DISPOSITION

The judgment is affirmed.

RIVERA, J.

We concur:

KAY, P.J.

REARDON, J.